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VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: CC Docket No. 01-92 (Wireless Termination Service Tariffs)
Illinois Small ILEC Written *Ex Parte* Communication**

Dear Ms. Dortch:

I. INTRODUCTION AND SUMMARY

GVNW Consulting is filing these *ex parte* comments as part of GVNW's role in assisting the small Illinois rural carriers referenced in Attachment A to receive compensation from wireless carriers for the use of their rural networks. The Federal Communications Commission ("FCC") may soon be considering a petition filed by T-Mobile USA ("T-Mobile") challenging the lawfulness of wireless termination service tariffs. These wireless tariffs have been filed throughout the country by small rural incumbent local exchange carriers (ILECs) to address uncompensated wireless traffic terminating on rural networks. In Illinois, a group of small ILECs (collectively "the Illinois ILECs")¹ filed wireless tariffs because wireless carriers are sending traffic to their small rural exchanges in the absence of compensation or an agreement. T-Mobile and First Cellular have challenged the Illinois wireless tariffs in court. While the case is pending, T-Mobile and First Cellular are presently paying nothing for their use of the Illinois ILECs' facilities and services. As explained below, the Illinois ILECs urge the FCC to deny T-Mobile's petition.

II. OPPOSITION TO T-MOBILE'S PETITION

A. Background History in Illinois

The Illinois ILECs provide telecommunications service in rural areas of Illinois with high costs and low population densities. Wireless carriers such as T-Mobile are using the facilities of the Illinois ILECs in the absence of negotiated agreements or compensation arrangements. The wireless carriers have entered into agreements with the large ILECs operating in Illinois to terminate wireless calls to the large ILECs' wireline customers. These agreements also allow wireless carriers to deliver calls to the Illinois ILECs indirectly, but the

¹ Adams Telephone Co-Operative, C-R Telephone Company, The El Paso Telephone Company, Grafton Telephone Company, LaHarpe Telephone Company, Hamilton County Telephone Co-op, Marseilles Telephone Company, McDonough Telephone Co-Operative, Inc., McNabb Telephone Company, Metamora Telephone Company, Mid-Century Telephone Cooperative, Inc., Odin Telephone Exchange, Inc., and Yates City Telephone Company.

wireless carriers were supposed to establish compensation arrangements with the Illinois ILECs for the use of their network facilities and services.

For example, T-Mobile is making use of the Illinois ILECs' facilities and services through an indirect connection with large ILECs such as SBC Illinois (formerly Ameritech/Illinois Bell Telephone Company) and Verizon (formerly GTE), but T-Mobile has not negotiated an agreement with the Illinois ILECs under the Act to establish the terms and conditions for such use. The approved agreement between T-Mobile and Verizon requires T-Mobile to compensate the Illinois ILECs:

[T-Mobile] also assumes responsibility for compensation to the Local Provider that terminates the call.²

Likewise, T-Mobile's approved interconnection agreement with Verizon also requires T-Mobile to enter into agreements with Illinois ILECs.

[T-Mobile] agree[s] to enter into their own agreements with third-party Local Providers.³

Although this agreement has been approved and on file with the Illinois Commerce Commission ("ICC") for years, T-Mobile has not compensated the Illinois ILECs or entered into any agreements. Because T-Mobile and the Illinois ILECs are indirectly connected, the Illinois ILECs cannot block or otherwise prevent T-Mobile's unauthorized and uncompensated use of their facilities and services. As a result, T-Mobile is unjustly rewarded for its "calculated inaction" with free call termination.⁴

B. The Illinois Wireless Termination Service Tariffs

On August 5, 2004, the Illinois ILECs filed wireless termination service tariffs designed to apply to intraMTA wireless traffic that is delivered to the Illinois ILECs' exchanges in the absence of compensation or an interconnection agreement. Specifically, the Illinois wireless tariffs were filed to address the problem of wireless carriers that routinely send wireless traffic to the Illinois ILECs' small rural exchanges without compensating the Illinois ILECs for the use of their facilities and services.

The tariffs only apply to wireless traffic that is delivered to the Illinois ILECs' local exchanges in the absence of an agreement under the Act. The express language of the tariffs makes them subordinate to approved agreements under the Act:

² This language from Section 3.3.2 of the Interconnection Agreement between AT&T Wireless and GTE (which is now Verizon) was adopted by VoiceStream (which is now T-Mobile) in Illinois Commerce Commission Docket No. 01-0684 and is on file with the ICC.

³ *Id.* at Section 3.3.2.

⁴ See *State ex rel. Sprint Spectrum v. Mo. Pub. Serv. Comm'n*, 112 S.W.3d 20, 26 (Mo. App. 2003)(discussing the wireless carriers' "calculated inaction" in Missouri).

The tariff applies except as otherwise provided in 1) an interconnection agreement between the [wireless] provider and the Telephone Company approved by the Commission pursuant to the Act; or 2) a terminating traffic agreement between the [wireless] provider and the Telephone Company approved by the Commission.

In other words, the tariffs only apply to traffic that is delivered by wireless carriers that have failed to take the necessary steps to invoke the reciprocal compensation procedures under the Act. To avoid the tariffs, all the wireless companies have to do is engage in rate negotiations with the rural companies and, thereby, invoke the Act's reciprocal compensation procedures and pricing standards. Until that happens, the wireless companies should not be heard to complain that the wireless tariffs conflict with federal law.

The tariffs do not prevent any wireless carrier from establishing a negotiated agreement or otherwise conflict with the Act's procedural requirements, and they "provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements."⁵

C. Wireless Tariffs Are Lawful.

The Illinois wireless tariffs are lawful and consistent with the Act. The Missouri small ILECs filed detailed *ex parte* comments in response to T-Mobile's federal law arguments on both August 17, 2004 and January 21, 2005. The Illinois ILECs fully concur in the Missouri small companies' more extensive comments, and the following is only a brief summary of the legal authority for the Illinois wireless tariffs.

Under the Telecommunications Act of 1996 ("the Act"), ILECs are required to negotiate with requesting wireless carriers that wish to use the ILEC's facilities and services to complete ("terminate") wireless calls.⁶ The Act sets out a clear procedure and timeline for negotiations with ILECs and, if necessary, mediation and/or arbitration before state regulatory commissions. Once an agreement has been reached, its prices and terms are subject to review by the state commission.⁷ If the agreement is approved by the state commission, it is then subject to review before an appropriate federal district court.⁸

In the absence of such an agreement, the Act *does not* prohibit state commissions from approving and enforcing access and interconnection obligations for ILECs. Indeed, the Act specifically preserves state access regulations:

[The FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that:

⁵ *Sprint Spectrum*, 112 S.W.3d at 26.

⁶ See 47 U.S.C. §§251 and 252.

⁷ 47 U.S.C. §252(e).

⁸ 47 U.S.C. §252(e)(6).

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) is consistent with the requirements of this section; and
- (C) **does not substantially prevent implementation of the requirements of this section and the purposes of this part.**⁹

Thus, the Act expressly allows state commissions to impose requirements on a telecommunications carrier for intrastate services so long as they are not inconsistent with the Act or FCC regulations.¹⁰

In *Sprint Spectrum v. Missouri PSC*, the Missouri Court of Appeals examined similar tariffs and explained:

The rural carriers have a constitutional right to a fair and reasonable return upon their investment. The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory. **The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction.** The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements.¹¹

Sprint Spectrum correctly held that the wireless tariffs are not preempted by the Act.

In Illinois, T-Mobile is currently delivering traffic to the Illinois ILEC exchanges and making use of the Illinois ILECs' facilities and services, but T-Mobile has not initiated the specific negotiation or dispute resolution provisions (*i.e.*, mediation and/or arbitration) contained in the Act. The Illinois tariffs only apply to those carriers that are sending traffic in the absence of a negotiated agreement. Under the Act, it is T-Mobile's right and responsibility to request negotiations where it is using the facilities of another telecommunications carrier. The Illinois ILECs have a constitutional right to payment for the use of their networks, and FCC should prohibit wireless calls from continuing to terminate for free because this is confiscatory.¹²

D. There Are No *De Facto* "Bill-and-Keep" Agreements.

None of the Illinois ILECs have agreed to allow T-Mobile to use their facilities and services for free under a "bill-and-keep" arrangement, and no such agreements have been filed with or approved by the ICC as required by the Act.¹³ Nevertheless, T-Mobile argues that its traffic is presently being delivered to the Illinois ILECs on a "bill-and-keep" basis.

⁹ 47 U.S.C. §251(d)(3)(emphasis added).

¹⁰ See also 47 U.S.C. §261(c).

¹¹ *Sprint Spectrum v. Missouri PSC*, 112 S.W.2d 20 at 25. (Internal citations omitted and emphasis added.)

¹² See *Sprint Spectrum v. Missouri PSC*, 112 S.W.2d 20, 26 (citing *Smith et al. v. Ill. Bell Tel. Co.*, 270 U.S. 587, 591-92, 70 L.Ed. 747, 46 S.Ct. 408 (1946)).

¹³ 47 U.S.C. §252(e).

T-Mobile's argument is flatly inconsistent with the FCC's "bill-and-keep" rules. Under the FCC's "bill-and-keep" rules, a state commission may only impose a bill-and-keep arrangement if it determines that the amount of traffic from one network to the other is "roughly balanced with the amount of telecommunications traffic flowing in the opposite direction and is expected to remain so."¹⁴ The ICC has made no such finding in Illinois. Furthermore, the ICC cannot make such a finding because the volume of wireless traffic flowing to small rural exchanges is much higher than the traffic flowing in the opposite direction. For example, T-Mobile has agreed to an 80% to 20% mobile-to-land factor in its agreement with Verizon. This means T-Mobile has agreed that of all the traffic it exchanges with Verizon, 80% of that traffic is mobile-to-land and only 20% is land-to-mobile. Because the amount of traffic flowing between the wireless carriers and the Illinois ILECs is not roughly balanced, the ICC cannot impose a bill-and-keep arrangement.

III. RESPONSE TO FIRST CELLULAR

On December 14, 2004, Southern Illinois Partnership d/b/a First Cellular of Southern Illinois ("First Cellular") submitted *ex parte* comments in opposition to the Illinois ILECs' wireless termination tariffs.¹⁵ First Cellular's objections to the lawfulness of the wireless tariffs are substantially the same as T-Mobile's arguments and have been addressed above. First Cellular also offers specific information about costs, rates, and negotiations, and the Illinois ILECs will address each of these points in turn.

A. The Illinois Tariff Rates

The Illinois ILEC wireless termination tariff rates range from \$0.03 to \$0.06 per minute, and First Cellular claims that these rates are "substantially higher than reciprocal compensation rates or any other measure of efficient costs."¹⁶ First Cellular's argument is flawed. As a threshold matter, the Illinois ILECs incur costs to terminate wireless traffic, and the total volume of wireless traffic terminating to the Illinois ILECs has increased substantially over the last decade. The Illinois ILECs must be allowed to recover their costs of providing service. The FCC's *Local Competition Order* explains:

In general, we find that carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs. In addition, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient . . .¹⁷

Thus, tariff rates are clearly a better measure of the Illinois ILECs' cost of providing service than the free call termination that First Cellular seeks to receive.

¹⁴ 47 C.F.R. § 51.713(b); *In the Matter of the Local Competition Provisions in the Telecommunications Act*, CC Docket No. 96-98, 11 FCC Rcd 15499, *First Report and Order*, rel. Aug. 8, 1996.

¹⁵ First Cellular *Ex Parte*, filed Dec. 14, 2004 in CC Docket No. 01-92.

¹⁶ *Id.* at p. 2.

¹⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499 (1996), *Report and Order*, ¶1112.

The Minnesota Public Service Commission recently observed that wireless tariff rates were preferable to a default compensation rate of \$0.00 (i.e., free service). The Minnesota Commission stated:

CenturyTel's [wireless] tariff will offer a more rational price, and the tariff will provide better alternatives to parties that object to paying that price. The price in CenturyTel's tariff must reflect its cost of termination – that is, it must reflect an estimate of the price that would result if the issue were submitted for arbitration pursuant to §252(d)(2)(A). In contrast, *de facto* bill-and-keep reflects a mutual termination rate of \$0. . . . Indeed, the FCC specifically rejected the idea that bill-and-keep should be the default basis for terminating wireless traffic.¹⁸

Again, the Illinois ILECs incur costs to terminate wireless calls, and the wireless tariff rates offer a more rational and reasonable estimate of these costs than a rate of \$0.00.

First Cellular's claim that the tariff rates are "substantially higher than reciprocal compensation rates" is also false. For example, ALLTEL Wireless, Cingular Wireless, Sprint PSC, T-Mobile, and Verizon Wireless have agreed to a negotiated reciprocal compensation rate of \$0.035 per minute to terminate wireless traffic on similarly situated small rural carrier networks in Missouri.¹⁹ Thus, all of Missouri's major wireless carriers have agreed to a \$0.035 reciprocal compensation rate that is within the \$0.03 to \$0.06 range of the Illinois ILEC tariff rates.

B. Traffic Volumes

First Cellular argues that "the traffic volume does not justify the expense of direct connections and formal interconnection agreements" with the Illinois ILECs. First Cellular also complains that "[t]he estimated cost for just the 8 rural LECs included in this tariff will be between \$200,000 and \$300,000 in 2005," and First Cellular concludes that "these costs can be significant."²⁰ The Illinois ILECs dispute First Cellular's claim that these traffic volumes do not justify agreements or compensation. On the contrary, these dollar amounts and associated traffic volumes are significant and substantial for small carriers such as the Illinois ILECs.

First Cellular argues that "smaller CMRS providers . . . are less able to absorb these costs"²¹ but the very same reasoning applies to the Illinois ILECs. The Illinois ILECs are also small rural carriers, and they serve in high cost rural areas with low population densities. If First Cellular does not like the tariff rates, then First Cellular can initiate the Act's

¹⁸ *In the Matter of Wireless Local Termination Tariff Applicable to Commercial Mobile Radio Service Providers that Do Not Have Interconnection Agreements with CenturyTel of Minnesota*, Docket No. p-551/M-03-811, 2004 Minn. PUC LEXIS 101, *Order Affirming Prior Order*, issued July 12, 2004.

¹⁹ See e.g. MoPSC Case Nos. IO-2003-0207 (Verizon Wireless); TK-2003-0533 (Sprint PCS); TO-2004-0445 (Cingular); TO-2002-0147 (ALLTEL Wireless); TK-2004-0165 (T-Mobile).

²⁰ First Cellular *ex parte* comments, p. 2.

²¹ *Id.*

procedures for a negotiated rate. But until that time, First Cellular must pay the tariff rates for its use of the Illinois ILECs' networks. First Cellular can no longer be allowed to use the Illinois ILECs' facilities and services for free. As a policy matter, it makes no sense for First Cellular to get a completely free ride while other ILECs and interexchange carriers (IXCs) all have to pay for their use of the Illinois ILEC networks.

C. Negotiations

First Cellular claims that the Illinois ILECs seek to "bypass the federal process" and avoid requesting interconnection negotiations. The Illinois ILEC wireless tariffs are expressly subordinate to negotiated agreements, so First Cellular's claim contradicts the plain language of the tariffs. Moreover, the FCC's reciprocal compensation rules make it clear that it is First Cellular's responsibility to request negotiations when it seeks to use another carrier's facilities and services:

Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic ***with any requesting carrier***.²²

Reciprocal compensation arrangements do not come into being automatically. Rather, the FCC "expect[s] that ***the requesting carriers*** would utilize the interconnection agreement process of sections 251 and 252 to obtain services under section 251."²³

As a practical matter, the tariffs do not prevent First Cellular from negotiating an agreement. In fact, the wireless tariffs may be the only mechanism that will bring carriers to the table. In Missouri, the wireless carriers only entered into agreements after the wireless tariffs were approved. In Illinois, US Cellular initiated negotiations with the Illinois ILECs after the tariffs were filed, and the Illinois ILECs are negotiating as required under the Act. First Cellular has the same right to compel negotiations, but First Cellular has chosen delay and litigation instead. Clearly, First Cellular seeks to avoid paying for its use of the Illinois ILECs' facilities for as long as possible.

IV. PROPOSED RESOLUTIONS

The Commission should deny T-Mobile's Petition. T-Mobile has not established an agreement for the wireless traffic that it is sending to the Illinois ILECs, and T-Mobile is presently paying nothing for its use of the Illinois ILECs' facilities. The wireless tariffs are expressly subordinate to negotiated agreements. There is nothing unlawful about wireless termination tariffs that establish the rates, terms, and conditions for wireless-originated traffic that is delivered in the absence of an approved compensation or interconnection agreement. Therefore, the tariffs do not conflict with the Act and provide an appropriate interim compensation method until the wireless carriers establish the agreements envisioned by the Act.

²² 47 C.F.R. §51.703 (emphasis added).

²³ *TSR Wireless v. US West*, 15 FCC Rcd 11166, 2000 FCC LEXIS 3219, *Memorandum Opinion and Order*, rel. June 21, 2000, ¶¶28, fn 97.

The Illinois ILECs further agree with the positions of the Missouri Small ILEC (as stated in its January 21 *ex parte* letter) that if the FCC does not dismiss T-Mobile's Petition, then any subsequent decision on the legality of wireless termination service tariffs should address the following points. These three safeguards will ensure that small rural companies are appropriately compensated for the use of their network facilities and services.

First, wireless carriers must be required to negotiate agreements with small rural ILECs before they begin sending traffic to those ILECs over indirect connections. Although US Cellular has requested negotiations, other carriers such as First Cellular and T-Mobile have brought suit against the Illinois ILECs in federal court. As long as First Cellular and T-Mobile can receive a free ride on the Illinois ILEC networks, they will have no incentive to enter into agreements with the Illinois ILECs.

Second, the FCC should clarify that small rural ILECs may compel negotiation and arbitration before state commissions pursuant to the Act. Because the rights of rural ILECs to compel negotiations are not entirely clear, the FCC should clarify that small rural ILECs have the right to compel negotiation and arbitration under the Act if a wireless carrier is sending traffic in the absence of a compensation or interconnection agreement.

Third, the FCC should ensure that state commissions have authority to award compensation for wireless traffic terminated to small rural ILEC exchanges prior to the effective date of an approved agreement. Wireless carriers, including T-Mobile, have terminated traffic to small ILECs for years without payment. State commissions should be allowed to award the appropriate compensation, if any, for traffic terminated prior to an agreement.

Respectfully submitted,



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ATTACHMENT A

THE SMALL ILLINOIS INCUMBENT LOCAL EXCHANGE COMPANIES ("ILECs")

Adams Telephone Co-Operative
C-R Telephone Company
The El Paso Telephone Company
Grafton Telephone Company
LaHarpe Telephone Company
Hamilton County Telephone Co-op
Marseilles Telephone Company
McDonough Telephone Co-Operative, Inc.
McNabb Telephone Company
Metamora Telephone Company
Mid-Century Telephone Cooperative, Inc.
Odin Telephone Exchange, Inc.
Yates City Telephone Company